

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matters of)	
)	
Performance Measurements and Standards for Interstate Special Access Services	)	CC Docket No. 01-321
)	
Petition of U S West, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate U S West's Provision for Federally Tariffed Interstate Services	)	CC Docket No. 00-51
)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141
)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket No. 96-149
)	
2000 Biennial Regulatory Review - Telecommunications Service Quality Reporting Requirements	)	CC Docket No. 00-229
)	
AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self- Executing Remedies Need to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services	)	RM 10329

**REPLY COMMENTS OF
CABLE & WIRELESS USA, INC.**

Audrey Wright
CABLE & WIRELESS USA, INC.
Director, Domestic Regulatory Affairs
1130 Connecticut Ave., NW, Suite 1201
Washington, D.C. 20036
(202) 530-8085 (telephone)
(202) 530-8094 (facsimile)

Steven A. Augustino
Jennifer M. Kashatus
KELLEY DRYE & WARREN, LLP
1200 19th Street, NW, Suite 500
Washington, D.C. 20036
(202) 955-9600 (telephone)
(202) 955-9792 (facsimile)

February 12, 2002

EXECUTIVE SUMMARY

The comments submitted in this proceeding overwhelmingly demonstrate that the market for special access services is heavily dominated by the incumbent local exchange carriers (“ILECs”), and that the ILECs’ special access provisioning practices are far below acceptable levels. Indeed, no fewer than sixteen carriers – carriers of all sizes, carriers using facilities-based and non-facilities-based strategies, and carriers relying on special access for Internet, local and long distance services – have submitted comments urging the Commission to take action to improve ILEC performance. Thirteen companies, including Cable & Wireless, and three major competitive carrier trade associations have joined together to support a reasonable, and well-defined set of performance metrics that could be used as a starting point to measure and improve ILEC performance.

Regulatory intervention is particularly warranted in the circumstances presented in this proceeding – dominant firms using their control over essential, bottleneck local access facilities to harm competition in other markets, including local, long distance, and high-speed data and Internet access. In the absence of regulatory intervention, competitive alternatives will continue to diminish, which in turn will serve to entrench the ILECs’ currently near-monopoly control over local loop facilities and services.

The ILECs’ claim that performance measures are unnecessary and burdensome is based on the false premise that the special access market is vigorously competitive. According to the ILECs, the very same customers that are complaining of poor service have multiple alternative sources of supply. They further claim that these customers are receiving special access performance plans tailored to their needs, and that, as a result of pricing flexibility, are receiving Service Level Agreements and other forms of price competition. The ILECs’

representations concerning the status of the special access market, however, are incomplete, misleading, and in some cases, simply false.

First, actual ILEC performance is incompatible with a vigorously competitive market characterized by sophisticated providers with meaningful alternatives. As Cable & Wireless showed in its initial comments, ILEC performance has deteriorated in the past few years. This view is supported by the comments of a number of other special access customers, suggesting that it is not just Cable & Wireless that is receiving sub-standard performance. Yet, the record demonstrates that the ILECs remain the dominant providers of special access services. If a competitive market truly existed, purchasers of special access services long ago would have turned to non-ILEC vendors. The fact that Cable & Wireless and other carriers remain dependent on the ILECs, despite their unreasonable, anticompetitive, and discriminatory practices is incontrovertible evidence that competitive alternatives simply do not exist. The ILECs make no serious effort to refute this elementary premise.

Second, Cable & Wireless's and other carriers' real world experiences refute the ILECs' claims concerning competition in the special access market. Last summer, Cable & Wireless issued a Request for Proposals addressing local access alternatives in eight large MSAs. The responses to that request demonstrate not only that non-ILEC providers serve very few buildings in those MSAs, but also that ILEC-offered pricing generally is not competitive with the market. Moreover, although pricing flexibility permits the ILECs to negotiate customized special access arrangements, Cable & Wireless does not have a customized agreement with any ILEC.

There is only one reasonable explanation as to why Cable & Wireless and other carriers remain dependent upon the ILECs despite their high rates and poor service: the ILECs

are the dominant providers of special access services, and competitive providers, in most instances, have no choice but to use facilities that are owned and operated by an ILEC. The ILECs' data purporting to count the number of competitive alternatives available to a carrier such as Cable & Wireless are exposed by a real world examination of the market in action. Cable & Wireless actively seeks to utilize non-ILEC vendors, but finds that few can supply alternative circuits wholly bypassing the incumbents' facilities. Most commonly, Cable & Wireless finds that alternative vendors do not have the "last mile" facilities to individual customer premises, and as a result, even its vendors would depend upon the ILEC for some portion of any special access circuit the vendor might provision to Cable & Wireless. Thus, whether it deals with the ILEC directly by purchasing special access services from the ILEC, or indirectly by purchasing special access services through another vendor, Cable & Wireless ultimately must rely upon the incumbent to provide services it vitally needs.

Cable & Wireless submits that reasonable special access performance metrics are a necessary first step to addressing the deficiencies of today's special access services. Contrary to ILEC claims about market distortions, performance standards for the provisioning and maintenance and repair of special access services will help, not hinder, the development of competition. Performance standards will clarify the incumbents' obligations, enable the monitoring and comparison of special access performance, and facilitate efficient complaint and other enforcement mechanisms to raise performance to acceptable levels. Cable & Wireless urges the Commission to heed the calls of special access customers and bring visibility into and accountability for the ILECs' special access performance.

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matters of)	
)	
Performance Measurements and Standards for Interstate Special Access Services	)	CC Docket No. 01-321
)	
Petition of U S West, Inc., for a Declaratory Ruling Preempting State Commission Proceedings to Regulate U S West's Provision for Federally Tariffed Interstate Services	)	CC Docket No. 00-51
)	
Petition of Association for Local Telecommunications Services for Declaratory Ruling	)	CC Docket Nos. 98-147, 96-98, 98-141
)	
Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended	)	CC Docket No. 96-149
)	
2000 Biennial Regulatory Review – Telecommunications Service Quality Reporting Requirements	)	CC Docket No. 00-229
)	
AT&T Corp. Petition to Establish Performance Standards, Reporting Requirements, and Self- Executing Remedies Need to Ensure Compliance by ILECs with Their Statutory Obligations Regarding Special Access Services	)	RM 10329

**REPLY COMMENTS OF
CABLE & WIRELESS USA, INC.**

Cable & Wireless USA, Inc. (“Cable & Wireless”), through its attorneys, submits these reply comments in the above-captioned proceeding. Comments in this proceeding demonstrate that the adoption of performance measurements for special access services is a reasonable method of ensuring that ILEC special access practices will not continue to harm competition in the high-speed telecommunications market. The record is replete with evidence

that carriers have experienced repeated and persistent problems obtaining special access services from the incumbent local exchange carriers (“ILECs”): ILECs delay in providing a firm order commitment (“FOC”) date to their carrier customers, repeatedly fail to provision circuits on the FOC date, install circuits far in excess of stated intervals, and provide poor maintenance and repair. Notably, the ILECs do not offer data of their own to refute the numerous claims concerning their poor performance.

Instead, the ILECs’ comments focus on a largely academic debate concerning whether the special access services market is competitive. Reciting the twin mantras of deregulation and the market, the ILECs contend that the problem is nonexistent and/or will fix itself. As shown herein, Cable & Wireless’s experiences and the record evidence underscore the urgent need to remedy the problems in the special access services marketplace. Cable & Wireless submits that reasonable and comprehensive performance metrics are necessary to enable carriers and the Commission to monitor and enforce just and reasonable performance by ILECs.

I. ILECS DOMINATE THE SPECIAL ACCESS SERVICES MARKETPLACE

A. Cable & Wireless Depends Upon ILECs for the Provision of Special Access Services

Cable & Wireless urges the Commission to reject the ILECs’ spurious and unsubstantiated claims concerning the degree of competition in the special access market, and instead consider the actual and documented experiences of the commenters in this proceeding. Indeed, upon an objective analysis of competitive market conditions, it is clear that the ILECs are the dominant providers of special access services, and that despite their unreasonable and

discriminatory provisioning practices, carriers such as Cable & Wireless remain critically dependent upon ILEC-provided facilities and services.¹

As explained in its initial comments, Cable & Wireless affirmatively attempts to obtain special access services from alternative (non-ILEC) providers.² For each order, prior to placing an order with the ILEC, Cable & Wireless first determines whether its alternative providers can provision the desired services. In making this determination, Cable & Wireless seeks what it refers to as a “Type 1” facility, meaning that the alternative provider can provision the circuit to the specified address entirely through the provider’s own facilities. If the alternative provider has the necessary Type 1 facility, then Cable & Wireless places the order with the non-ILEC vendor. In other words, in all instances where an alternative provider can provision a circuit to the specified location using its own facilities, Cable & Wireless places its order with that provider. This “first look” to competitive providers – before turning to ILEC suppliers – ensures the maximum possible use by Cable & Wireless of non-ILEC vendors.

The alternative providers Cable & Wireless turns to, however, have not been able to build out their networks to the same extent as the ILECs. Thus, in the vast majority of instances, the alternative provider notifies Cable & Wireless that it can provision only a Type 2 circuit to the desired location. A Type 2 circuit means that the vendor requires the use of the ILEC’s facilities for all or part of the circuit (typically the last mile, *i.e.*, the loop or channel termination). Despite Cable & Wireless’s efforts and preference to use alternative providers to provision special access services, non-ILEC vendors accounted for only approximately thirteen

¹ See, e.g., Cable & Wireless Comments at 3-4; AT&T Wireless Comments at 3 (stating that AWS “seldom has any choice but to utilize incumbent LEC special access services because they are often the only ones available.”); Sprint Comments at 4-5 (stating that Sprint Long Distance “continues to rely upon the ILECs for approximately 93% of its total special access needs despite aggressive attempts to self-supply and to switch to facilities offered by alternative access vendors (AAVs) whenever feasible.”).

percent (13%) of Cable & Wireless's new installations for the year 2001.³ If alternative sources truly existed, the percentage of non-ILEC installations would have been higher.

The responses that Cable & Wireless received from a relatively recent Request for Proposals ("RFP") further demonstrate ILEC dominance of the special access marketplace. In July 2001, Cable & Wireless submitted an RFP for local access services to many special access services vendors, including both ILECs and alternative providers. Cable & Wireless sought to develop new or expanded relationships with vendors in various MSAs throughout the United States. Cable & Wireless requested various information from the vendors, including a list of the buildings where the carrier could provision Type 1 circuits. The results of Cable & Wireless's RFP illustrate that Cable & Wireless often cannot obtain special access services from alternative providers. Of the carriers that responded, the ILECs generally stated that they serve all of the buildings in a particular MSA. In contrast, in most circumstances, non-ILEC vendors reported that they each serve fewer than twenty-five buildings per MSA. The following table provides additional details concerning the types of responses generated by the RFP.

MSA	Largest # Buildings Served by Non-ILEC Vendor ⁴	# Vendors Serving > 100 Buildings	# Vendors Serving Between 25 and 99 Buildings	# Vendors Serving < 25 Buildings	Total # Vendors Responding
Atlanta	173	1	1	9	11
Chicago	230	1	2	8	11
Dallas	242	1	4	6	11
Los Angeles	262	2	3	7	12
Miami	36	0	3	5	8
New York	284	1	4	8	13
San Francisco	418	1	1	7	9
Seattle	102	1	3	5	9

² Cable & Wireless Comments at 4.

³ See also WorldCom Comments at 9-10 (stating that "approximately 90 percent of WorldCom's off-net special access circuit needs were provisioned by the incumbent LECs, even though it is WorldCom's policy to use the local facilities of WorldCom or other competitive carriers whenever such facilities are available.").

⁴ The chart contains information supplied by non-ILEC vendors only.

Although not all ILECs responded to Cable & Wireless's survey, those ILECs that did respond emphasized the ubiquity of their network coverage. ILECs generally assert that they serve all buildings within their operating areas. At least one ILEC stated that, within a target interval of 90 days, it could install facilities to reach any building within its service area. This amount of time is significantly shorter than it would take a CLEC to deploy facilities to a new building.

B. Cable & Wireless Does Not Have Sufficient Alternative Suppliers.

Cable & Wireless supports the position of the alternative providers, which argue that ILECs remain the dominant providers of special access services and that the special access services market is not competitive.⁵ To provide special access services, alternative vendors must build transport, construct (or obtain) loops, and obtain access to the necessary buildings. Therefore, to evaluate whether there are viable alternative providers and whether the special access services market is competitive, the Commission must examine the feasibility of alternative providers provisioning each part of the special access circuit. This type of evaluation is consistent with the Commission's *Notice of Proposed Rulemaking* in this proceeding, which recognized that there may be distinctions among the components of the special access circuit.⁶ As the record in this proceeding illustrates, alternative providers from which Cable & Wireless

⁵ See, e.g., AT&T Comments at 2-3; AT&T Wireless Comments at 3; CompTel Comments at 2; Focal Comments at 12; Mpower Communications Comments at 8; WorldCom Comments at 10.

⁶ *Performance Measurements and Standards for Interstate Special Access Services, Notice of Proposed Rulemaking*, FCC 01-339, at para. 14 (Nov. 19, 2001) (seeking comment on whether the Commission should require performance measurements on those portions of the circuit that have received pricing flexibility).

purchases special access services, such as Time Warner, XO Communications, and Cablevision Lightpath, encounter challenges in obtaining each portion of the special access circuit.⁷

ILECs, however, would have the Commission believe that the number of competitive providers, taken as a whole, translates to competition in the special access marketplace.⁸ As an initial matter, as AT&T noted, ILEC data do not accurately reflect the state of competition in the special access services marketplace. The data on which the ILECs rely was prepared over one year ago. Many of the CLECs cited in that data now are encountering severe financial difficulties, have gone out of business, or have merged with other carriers.⁹

Further, ILEC data attempt to mask the problems alternative providers encounter by glossing over the parts of a special access circuit. ILECs focus, for example, on total dollars CLECs invested in the special access marketplace but do not examine the CLEC penetration in each part of the special access circuit.¹⁰ In doing so, ILECs ignore that competing providers have concentrated their deployment on entrance facilities, not on the last mile.¹¹ As discussed more thoroughly below, without access to the last mile, a competitive provider still must rely on the ILEC to provision special access services to the alternative provider's customers, and therefore, cannot be said to be a viable alternative to an ILEC. Moreover, in Cable & Wireless's experience, the majority of alternative provider fiber is located in central offices with a major

⁷ See Comments of Time Warner Telecom and XO Communications at 4-6; Cablevision Lightpath Comments at 2.

⁸ See, e.g., Qwest Comments at 2 (stating that [h]undreds of carriers have invested billions of dollars in new fiber networks and other facilities (such as fixed microwave) capable of providing special access services.”).

⁹ AT&T Comments at 10-11.

¹⁰ See SBC Comments at 2.

¹¹ See, e.g., *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd 3696, 3852-53, para. 349 (stating that “the entrance facility

carrier point of presence (“POP”) nearby. The further a customer building is located from the central office, the fewer alternative providers available. Therefore, alternative providers do not serve many areas in which customers demand special access services.¹²

1. Last Mile

ILEC domination of the special access market is particularly pervasive with regard to the last mile connection to the end user: loops and channel terminations. The loop is an essential element of every special access circuit. Comments in this proceeding, however, illustrate that there is a lack of available CLEC-provided last mile facilities. In many instances, even those alternative providers that have obtained access to or constructed entrance facilities still must obtain the loop or channel termination portion of the circuit from the ILEC.¹³

As Time Warner and XO Communications indicate, even a vendor “that prefers to construct its own loop facilities still is critically dependent upon ILEC special access to serve business customers.”¹⁴ Contrary to SBC’s position, alternative providers cannot “readily” extend their networks to serve any potential customer.¹⁵ Alternative providers’ networks cannot reach – or even contemplate reaching – the breadth of customers served by the ILECs, which have built out their networks over an extended period of time.¹⁶ In many instances, it is not cost effective

market appears to be the most mature segment of the interoffice transport market ...”) (*“UNE Remand Order”*).

¹² See, e.g., WorldCom Comments at 10 (stating that the number of customers competitive providers reach is *de minimus*).

¹³ See Comments of Time Warner Telecom and XO Communications at 4; see also WorldCom Comments at 4.

¹⁴ Comments of Time Warner Telecom and XO Communications at 4; see also Cablevision Lightpath Comments at 2 (stating that it is dependent upon ILEC facilities to supplement its service footprint).

¹⁵ See SBC Comments at 2; see also Verizon Comments at 7.

¹⁶ See, e.g., Comments of Time Warner Telecom and XO Communications at 5; see also *UNE Remand Order*, 15 FCC Rcd at 3779-80, para. 183 (stating that ILECs “enjoy

for alternative providers to construct their own facilities to reach end users. End user locations may be too far from alternative providers' networks to justify the construction of facilities, or a customer may seek a product that does not generate sufficient revenue or traffic volume to justify the cost of building out the network.¹⁷ By contrast, several ILECs responded to Cable & Wireless's RFP by offering to construct facilities even if only one order were placed.¹⁸

Additionally, as AT&T and Time Warner explain, network construction can be extremely time consuming to accomplish.¹⁹ End users often are unwilling to wait for the construction of new facilities.²⁰ Thus, an alternative provider must obtain the loop or channel termination from the ILEC or risk losing the customer altogether.

2. Rights-of-Way/Building Access Issues

Even if alternative providers can obtain both transport and loops, comments in this proceeding illustrate that alternative providers often experience significant obstacles in obtaining access to rights-of-way and to buildings. Alternative providers are hindered by local municipality regulations that impose stringent franchising restrictions on CLECs while exempting the ILEC from the same, either explicitly or implicitly.²¹ Alternative providers

advantages of scope that competitors cannot replicate" because of the size of their networks).

¹⁷ See, e.g., Comments of Time Warner Telecom and XO Communications at 2-3.

¹⁸ See *supra* page 4. The ILECs, since they serve virtually all local customers, presumably can make this offer because the facilities will be useful to serve one of the ILEC's other customers even if the original purchaser cancels service. Competitive providers have no such assurance of revenues and therefore are unable to build any building upon request.

¹⁹ See AT&T Comments at 7-8; Comments of Time Warner Telecom and XO Communications at 5; see also *UNE Remand Order*, 15 FCC Rcd at 3779-80, paras. 183-84 (stating that building loop plant is "prohibitively expensive and time-consuming").

²⁰ See AT&T Comments at 8.

²¹ See Association of Local Telecommunications Services, Right-of-Way White Paper, at 15-18 (Nov. 1, 2001) (stating that "LFAs in jurisdictions that have not historically franchised ILECs frequently seek to regulate CLECs while exempting the ILEC, either explicitly, by exempting a class of service, or simply by refusing to enforce their ordinances on the well-financed monopolist.").

experience significant delays in receiving approval at the municipal level to install facilities. In contrast, ILECs already have existing franchise agreements in place with the local municipality and therefore do not have to go through the same rigmarole as the new entrant.

Cable & Wireless's primary non-ILEC special access vendors also complain that they do not have sufficient access to buildings. As Time Warner and XO Communications state, in most competitive MSAs, CLECs serve only thirteen percent (13%) of the buildings, whereas ILECs serve the remaining eighty-seven (87%) of the buildings.²² Landlords often impose unreasonable demands and excessive delays on competitors' efforts to serve tenants in certain buildings.²³ In other situations, carriers will sign contracts with building owners that preclude third parties from gaining access to such buildings.²⁴ The inability to gain access to the building precludes the vendor from providing service to the requesting customer.²⁵

3. Self-Supply

Cable & Wireless also does not have a realistic option of self-supplying special access circuits.²⁶ Throughout the past decade, Cable & Wireless has made substantial investments – more than half a billion dollars – in its Internet infrastructure. Cable & Wireless has transformed the legacy IP infrastructure acquired from MCI in 1998 into one of the largest and most advanced IP backbone networks in the world. Cable & Wireless's state-of-the-art network offers 16 times more capacity than the original network offered in 1998. Currently, this

²² Comments of Time Warner Telecom and XO Communications at 9.

²³ *Id.* at 5-6.

²⁴ Focal Comments at 12.

²⁵ *See also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to the Telecommunications Act of 1996, Third Report*, FCC 02-33, at 18 (Feb. 6, 2002).

²⁶ Several other commenters also state that self-provisioning special access services is not a viable alternative. *See, e.g.,* Sprint Comments at iii.

network has 51 nodes in operation (23 in the United States alone), and, when complete, will operate at OC-192 (9.6 Gps) capacity and incorporate 84 international nodes within the same autonomous system assigned to Cable & Wireless's IP infrastructure.

As a result of its investments in Internet infrastructure, Cable & Wireless has grown to become one of the global leaders in Internet Protocol networks and services, and is able to offer a variety of services to business customers, including, but not limited to, Internet access, high speed data transmission, video conferencing and voice telephony. The type of investment that Cable & Wireless has made in order to provide internet and IP-based products and services to business customers is substantially different from the type of investment that would be required to compete in the local telecommunications marketplace. Financial analysts anticipated that Cable & Wireless would have directed its investments, as it did, toward developing its Internet infrastructure. Were Cable & Wireless to have delved into the local telecommunications market, solely for the purpose, for example, of self-supplying special access circuits, Cable & Wireless might have encountered substantial market skepticism. Moreover, it would be neither economical nor practical for Cable & Wireless to become a CLEC solely for the purpose of self-supplying special access services. Companies must incur significant costs to become CLECs.²⁷ Obtaining CLEC status would have involved a substantial reallocation of funds and resources that were intended for IP-based operations. To expect any company to assume financial risks of this magnitude is to ignore the realities of the marketplace and sound business planning.

Even if Cable & Wireless were to spend the time and resources necessary to become a CLEC, it nevertheless would be unable to use the only type of unbundled network

²⁷ For example, CLECs must obtain certification to operate as a CLEC in each state, which is time consuming and costly. CLECs also incur significant costs to interconnect with the local carrier, to provide 911, number portability and other services, and to build local access facilities.

element (“UNE”) that makes practical sense as an alternative to special access services. The Commission has defined the enhanced extended link (“EEL”) so as to preclude its use in those situations that Cable & Wireless uses access services.²⁸ In the *UNE Remand Order*, the Commission recognized that there were significant benefits to the use of EELs.²⁹ EELs allowed CLECs to “serve customers without having to collocate in every central office in the ILEC’s territory,”³⁰ and thus reduced the costs of collocation and increased ILEC efficiencies.³¹ The Commission further stated that EELs could significantly reduce the costs of self-provisioning a switch because EELs could be provisioned more quickly than multiple collocation arrangements “without substantial up-front costs of establishing collocation in multiple central offices.”³²

Despite the recognized benefits of using EELs, the Commission imposed interim restrictions on their use, which permit CLECs to obtain EELs only if they provide “a significant amount of local exchange service.” These restrictions essentially require a CLEC to employ a local voice strategy, which would be incompatible with Cable & Wireless’s current business operations. Thus, Cable & Wireless could not realistically use UNEs as a replacement for the special access services it obtains from the ILECs.

²⁸ See, e.g., *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order Clarification*, 15 FCC Rcd 9587, 9598-9600, para. 22 (2000) (stating that a requesting carrier must provide a “significant amount of local exchange service” to obtain unbundled loop-transport combinations and setting forth the three circumstances in which a carrier satisfies that definition); see also Focal Comments at 2.

²⁹ *UNE Remand Order*, 15 FCC Rcd 3696 (1999).

³⁰ *Id.* at 3703-06, para. 15, Executive Summary.

³¹ *Id.* at 3828, para. 288.

³² *Id.* at 3828, para. 289.

C. The Current Special Access Marketplace is Not Capable of Improving Areas Where Performance is Deficient.

The ILECs' arguments that performance measurements are unnecessary because of the competitive state of the marketplace are without merit. As illustrated above, oftentimes Cable & Wireless is unable to obtain special access services from any entity other than the ILEC. In fact, the alternative providers from which Cable & Wireless purchases services explain that they encounter significant obstacles in obtaining each component of the special access circuit, from the transport and loop portions to obtaining building access. Therefore, in many instances, the ILEC is the only entity that can provision a special access circuit to the end user.

The marketplace is not capable of resolving special access performance problems. Carriers have experienced repeated and persistent problems obtaining special access services from ILECs for several years, with little to no signs of improvement. In fact, comments in this proceeding illustrate that ILEC performance in provisioning special access services is declining, not improving.³³ Without competition in the marketplace, ILECs do not have any incentives to improve their performance provisioning special access services. Furthermore, pricing flexibility neither indicates that the market is competitive nor serves as a basis for declining to institute performance measurements.

1. Pricing Flexibility is Not an Indicator that the Special Access Services Market is Competitive.

Cable & Wireless agrees with those commenters that argue that pricing flexibility is irrelevant to the issue of whether the Commission should adopt performance measurements for special access services. As both AT&T Wireless and WorldCom emphasize, collocation-based

triggers for granting pricing flexibility do not guarantee – or provide evidence – that the special access services market is competitive.³⁴ The Commission explicitly recognized in the *Pricing Flexibility Order* that ILECs still may exercise market power even after receiving pricing flexibility.³⁵ As one example, the record demonstrates that carriers remain dependent upon ILEC channel termination even in those MSAs where ILECs have satisfied the pricing flexibility triggers.³⁶

Furthermore, SBC misstates the D.C. Circuit Court’s decision in *WorldCom v. FCC* addressing pricing flexibility.³⁷ SBC would have the Commission believe that the Court found that the quantity of CLEC collocation in an MSA can constrain anticompetitive ILEC behavior.³⁸ In *WorldCom v. FCC*, the Court evaluated whether the Commission’s decision to grant an ILEC pricing flexibility upon a showing that there is significant collocation by one or more competitors was arbitrary and capricious.³⁹ The Court acknowledged that the Commission chose to use investment in collocation as a proxy for competition, but did not evaluate the weight of such a proxy. In fact, the Court stated that “it may well be that collocation is a poor measure

³³ See, e.g., VoiceStream Comments at 6-7 (stating that VoiceStream and other carriers have received poor ILEC performance with respect to the ordering process, installation, and ongoing maintenance).

³⁴ AT&T Wireless Comments at 12; WorldCom Comments at 35.

³⁵ See *Pricing Flexibility Order*, 14 FCC Rcd 14221, 14300, para. 151 (declining to grant non-dominant status to ILECs); see also AT&T Comments at 12; WorldCom Comments at 33-34.

³⁶ See WorldCom Comments at 34; Comments of Time Warner Telecom and XO Communications at 10.

³⁷ See SBC Comments at 10 (discussing *WorldCom v. FCC*, 238 F.3d 449 (2001)).

³⁸ *Id.*

³⁹ *WorldCom v. FCC*, 238 F.3d 457.

of market share . . . That competing firms have invested in collocation does not mean that they have captured a significant portion of the market share for access services.”⁴⁰

The SLA authority the Commission granted to ILECs pursuant to pricing flexibility neither illustrates that certain markets are competitive nor is sufficient to function as a marketplace mechanism to constrain competition. Since releasing its *Pricing Flexibility Order* in 1999, the Commission has granted Phase I and Phase II relief to various ILECs in select MSAs.⁴¹ Pricing flexibility has not led to additional product or service offerings or improvements in the special access services arena. Despite granting pricing flexibility to these ILECs, to date, it appears that ILECs have not filed any contract-based tariffs as permitted by Phase I pricing flexibility. Additionally, in certain instances, ILECs have refused to negotiate pricing terms or individual SLAs.⁴² Cable & Wireless has approached several ILECs, including all RBOCs, in an attempt to negotiate an SLA that would establish performance expectations, guarantees, and, in appropriate instances, penalties. To date, Cable & Wireless does not have an SLA with an ILEC special access vendor. Progress, if any, on such agreements has been slow and uneven. Thus, Cable & Wireless does not anticipate that the ILEC SLAs will provide meaningful relief in the near future.

ILECs still can charge unreasonably high rates for access to areas that lack competitive alternatives, which, as illustrated above, in the case of special access services, are the vast majority of the markets. In fact, as Sprint explains, ILEC rates are *higher* in markets

⁴⁰ *Id.* at 458.

⁴¹ See, e.g., *Verizon Petitions for Pricing Flexibility for Special Access and Dedicated Transport Services, Memorandum Opinion and Order*, 16 FCC Rcd 5876 (2001) (granting Verizon Phase I and/or Phase II relief in certain MSAs and non-MSA areas for access services); *Sprint Petition for Pricing Flexibility for Special Access and Dedicated Transport Services, Memorandum Opinion and Order*, 16 FCC Rcd 11005 (2001) (granting Sprint certain pricing flexibility in seven MSAs).

⁴² See AT&T Wireless Comments at 12-13.

where ILECs have obtained Phase II pricing flexibility.⁴³ Consistent with Sprint’s position, in Cable & Wireless’s experience, ILECs are not responding to pricing flexibility in a manner that uses their pricing flexibility authority. In response to Cable & Wireless’s RFP discussed above, those ILECs that responded generally referred to or attached their tariffed rates.

2. ILEC Performance Measures Are Insufficient.

The performance measures, if any, set forth within ILEC tariffs contain significant limitations, and thus, neither promote quality provisioning nor deter discrimination. As an initial matter, only some ILECs provide performance measures, and such measures are limited in scope. Performance measurements and guarantees contained within ILEC tariffs generally were created by the ILEC and were not the process of any collaborative efforts or negotiation.

SBC argues that it already provides certain performance guarantees within its Managed Value Plan (“MVP”) tariffs.⁴⁴ Yet, as WorldCom explains, SBC provides performance measurements only for those customers that agree to volume and term discounts.⁴⁵ To obtain the performance assurances (and slightly discounted pricing) from SBC, carriers must agree to a five-year term and “minimum annual revenue commitments” (“MARCs”).⁴⁶ In exchange for the five-year term commitment, SBC commits to an on-time target for DS1s only (it does not provide a target commitment for DS3s) and a credit of one percent (1%) of the MARC if it misses its DS1 installation commitment.⁴⁷ SBC only evaluates its performance annually, not

⁴³ Sprint Comments at 5.

⁴⁴ See SBC Comments at 3.

⁴⁵ WorldCom Comments at 25 (stating that “SBC’s tariff provides for performance only for those customers that agree to obtain service under its ‘Managed Value Plan’”).

⁴⁶ See SBC MVP Tariff at 38-12 – 38-14.

⁴⁷ See *id.*

monthly, or on a per order basis. Furthermore, the same one percent (1%) credit applies regardless of SBC's overall annual performance.⁴⁸ For example, if a carrier purchases \$20,000,000 in special access services annually from SBC, \$10,000,000 of which pertain to DS1s, and, on average for the past year SBC failed to provision the DS1 circuits by the target that SBC established, then the carrier would obtain a credit in the amount of only \$100,000. The credit would be the same regardless of whether SBC installed, for example, ten percent (10%) or eighty percent (80%) of the circuits on time.

ILEC arguments that special access performance measurements are not necessary because ILECs have negotiated specially tailored performance plans with carriers are also without merit. In its comments, SBC states that it has negotiated special access performance plans with several carriers including Cable & Wireless.⁴⁹ Cable & Wireless is not aware of any such performance plan. Cable & Wireless has requested a copy directly from SBC of the precise agreement to which SBC refers.⁵⁰

II. PERFORMANCE MEASUREMENTS, STANDARDS, AND BENCHMARKS WILL PROMOTE COMPETITION AND DETER DISCRIMINATORY CONDUCT.

The record is replete with evidence that carriers have experienced repeated and persistent problems obtaining special access services from ILECs.⁵¹ ILECs repeatedly miss committed due dates – dates established by the ILEC itself – and fail to provision the ordered

⁴⁸ See *id.*; see AT&T Wireless Comments at 10-11 (stating that the performance credits ILECs provide for service interruptions are too minimal to justify the expenditure of time and resources required).

⁴⁹ SBC Comments at 12-13.

⁵⁰ See Letter to Christopher Heimann, SBC, from Steven A. Augustino, Kelley Drye & Warren, Counsel for Cable & Wireless (Feb. 12, 2001), provided as Attachment A.

⁵¹ See, e.g., AT&T Corp., Petition for Rulemaking at 1.

circuits within the ILEC's own stated provisioning intervals. For the past several years, Cable & Wireless has experienced significant problems in obtaining special access services from the ILECs. As stated in its initial comments, since June 1999, Verizon has failed to provision the ordered circuits by the FOC date nearly fifty percent (50%) of the time.⁵² Further, comments in this proceeding illustrate that ILEC performance in provisioning special access services in fact has declined over the past several years. As one example, in VoiceStream's experience, the average interval for installing a special access circuit in the state of New York has increased from thirteen days in 1997-1999 to thirty days – over two times as long – in 2001.⁵³

The marketplace will not remedy ILECs deficient provisioning of special access services. As demonstrated above and throughout the record in this proceeding, carriers have limited, if any, alternatives to obtaining special access services from the ILECs. ILECs, therefore, with a captive customer base, do not have any incentives to improve their performance in provisioning special access services. Instituting performance measurements will benefit competition by promoting certainty in the marketplace, and will deter discriminatory conduct.

A. Performance Measurements Will Benefit Competition.

Even ILECs recognize the benefits of established performance measurements. Qwest, an ILEC provider of special access services, acknowledges that performance measurements and definitions could “facilitate a more efficient operation of the special access market.”⁵⁴ Sprint, an incumbent provider throughout various regions in the United States, also supports the adoption of national mandatory performance standards.⁵⁵

⁵² Cable & Wireless Comments at 3.

⁵³ VoiceStream Comments at 9.

⁵⁴ Qwest Comments at 2-3.

⁵⁵ See Sprint Comments at 1. Sprint filed its comments on behalf of its incumbent local, competitive local, long distance and wireless divisions.

Establishing performance measurements would provide certainty in the marketplace regarding the expected level of performance for provisioning special access circuits. ILECs have argued that they are not required by their tariffs to provision circuits within specified timeframes or even by the FOC date. For example, Verizon has argued that the FOC date – a date that Verizon itself provides to the customer as the installation date – is not “intended to be a binding commitment.”⁵⁶ The lack of standard definitions not only between the ILEC and its carrier customer, but also among special access providers, complicates disputes between the ILEC and a carrier customer, and makes it more difficult to obtain performance improvements from the ILEC. Since ILECs appear to be unwilling to acknowledge common industry standards that a FOC is a committed due date, establishing a standard set of definitions, such as defining that a FOC date indeed is a commitment, would enable carriers to enjoy some level of certainty regarding the provisioning of special access services.

Such measurements also would establish an objective standard upon which to measure a carrier’s performance. In *Cable & Wireless’s* formal complaint proceeding, for example, Verizon argued that the Commission has not established performance objectives for special access services upon which Verizon’s provisioning performance could be evaluated under section 201(b) of the Act.⁵⁷ Absent performance measurements, carriers, such as Verizon, will continue to argue that they cannot be held accountable for their performance provisioning special access services, because there is no objective standard upon which to measure their

⁵⁶ *Cable & Wireless USA, Inc. v. Verizon Defendants*, EB-01-MD-022, Verizon Answer, Legal Analysis at 2.

⁵⁷ Verizon Answer, Legal Analysis, at 4-5; *see also* BellSouth Comments at 6 (stating that the Commission must follow section 205 prescription procedures).

performance.⁵⁸ Carriers, therefore, will experience unnecessary costs trying to obtain increased performance, and constantly rescheduling orders due to ILECs' failures to install special access services on time.

Performance measurements will not distort competition. SBC seems to argue that the Commission cannot adopt uniform performance measurements because each carrier places different values of various performance measurements, depending upon that carrier's business needs. In the present situation, however, the carriers in favor of performance measurements, along with two trade associations, which represent a variety of carriers, already have joined together to propose uniform performance measurements.⁵⁹ The Joint Competitive Industry Group proposal represents the type of uniformity that SBC claims cannot be achieved.

B. Performance Measurements Will Deter Discrimination.

Currently, there are no effective tools to measure an ILEC's compliance with its nondiscrimination requirements.⁶⁰ As commenters have stated, ILEC performance data is considered proprietary, is not readily available, is outdated or too aggregated.⁶¹ The New York Public Service Commission data suggest that Verizon discriminated against other carriers in favor of its own affiliates in provisioning special access services.⁶² Requiring carriers to report performance data would enable the Commission (and carrier customers) to evaluate whether carriers are providing special access services in accordance with their nondiscrimination

⁵⁸ Performance measurements will not eliminate the disputes among carriers and their special access suppliers. In fact, the Commission's complaint process likely will continue to play a role in evaluating a carrier's performance provisioning special access services. Performance measurements, however, will streamline and focus the types of complaints that are brought before the Commission.

⁵⁹ See Ex Parte Presentation; Joint Competitive Industry Group (Jan. 22, 2002).

⁶⁰ See Sprint Comments at 6.

⁶¹ See *id.*; AT&T Comments at 13.

⁶² See Comments of the New York Public Utility Commission Comments at 3 n.5.

obligations. For example, carriers will be able to compare the performance that they receive from an ILEC with that ILEC's performance to its retail operations. Carriers also will be able to compare the performance that they receive with the performance an ILEC provides to all carriers. Additionally, carriers will be able to compare the performance they receive from one ILEC to another.

ILEC data as currently reported to some carriers is insufficient to evaluate an ILEC's performance provisioning special access services. First, in Cable & Wireless's experience, frequently there are not any business rules for how the data are collected, tracked, and reported to carrier customers. Therefore, carriers are unable to determine how the data are tabulated based on the report itself. Second, there is no consistency among ILECs regarding how they collect, track, and report the data.⁶³ Cable & Wireless obtains performance reports from several ILECs. Each ILEC reports information in vastly different formats and the content of the information differs. These ILEC reports do not contain business rules, for the most part, explaining how the data are collected, tracked, and reported. Third, carrier customers are unable to use the data ILECs report to compare an ILEC's performance in provisioning special access circuits among various carrier customers. Without uniform business rules, carriers are unable to compare the data they receive from various ILECs. Further, the performance reports Cable & Wireless currently receives contain information regarding performance to Cable & Wireless only. Therefore, Cable & Wireless is unable to compare the performance it receives with that of the performance given to other carriers.

⁶³ For example, each ILEC might employ a different definition of whether a circuit is considered on time. Some carriers include circuits coded as "Customer Not Ready" ("CNR") as on-time, while other carriers may not.

In Cable & Wireless's experience, having a uniform set of data is the easiest – and most effective way – to evaluate an ILEC's provisioning performance. Cable & Wireless brought a formal complaint alleging, *inter alia*, that Verizon discriminated against Cable & Wireless in provisioning special access circuits in favor of other carriers, Verizon retail, and Verizon's own affiliates.⁶⁴ To demonstrate that Verizon had engaged in such discrimination under section 202(a), for example, it was necessary for Cable & Wireless to demonstrate that the services provisioned to the various groups were "like services" and that indeed there was discrimination. Not all necessary data to evaluate discrimination is readily available. Therefore, Cable & Wireless had to obtain extensive discovery to be able to prove its position. In obtaining such discovery, Cable & Wireless learned that in many instances there were no business rules for the recording of such data. Without such business rules it is more difficult for a carrier to demonstrate that the services are "like" and thus to prove discrimination. Therefore, a uniform set of measurements will assist carriers in obtaining the necessary data to determine whether there has been discrimination, and may prevent unnecessary claims that allege discrimination, only to determine once all data is brought forward, that no such conduct has occurred.

III. CONCLUSION

Currently, there are no effective safeguards to guard against unreasonable and discriminatory provisioning by the ILECs. Indeed, due to the ILECs' near-monopoly control over last mile facilities, market forces are an ineffective means of ensuring that their special access provisioning performance will remain at acceptable levels for a sustained period of time. Moreover, there are no specific regulatory directives that require the ILECs to provide high-

⁶⁴ See *Cable & Wireless USA, Inc. v. Verizon Defendants*, EB-01-MD-022, Complaint (filed Sept. 4, 2001).

capacity services to their competitors within reasonable intervals, and at a particular level of quality. Because neither market pressures nor the current regulatory environment sufficiently deter ILEC misconduct, prompt and specific corrective action by the Commission is both necessary and warranted.

Performance measurements and standards, coupled with meaningful consequences for discriminatory and unreasonable performance, would discourage the ILECs from engaging in unreasonable and discriminatory practices. The lack of regulatory intervention, by contrast, would enable the ILECs to use their monopoly control over local bottleneck facilities to harm competition in the high-speed data and Internet access markets. Moreover, the lack of clear standards and reporting requirements relative to ILEC special access provisioning would impede the successful prosecution of enforcement actions against the ILECs.

Cable & Wireless has joined a coalition of key industry players, including the largest trade associations representing the competing carrier industry, in submitting to the Commission a “Joint Competitive Industry Proposal” (“JCIG Proposal”) relative to special access. The JCIG Proposal represents a reasonable approach to improving the special access provisioning process by giving regulators the ability to effectively monitor ILEC performance. These proposals will bring transparency to the special access provisioning process, thereby discouraging the ILECs from engaging in discrimination and other anticompetitive practices.

For the foregoing reasons, Cable & Wireless urges the immediate adoption of performance measurements for special access services.

Respectfully submitted,

Audrey Wright
CABLE & WIRELESS USA, INC.
Director, Domestic Regulatory Affairs
1130 Connecticut Ave., NW, Suite 1201
Washington, DC 20036
(202) 530-8085 (telephone)
(202) 530-8094 (facsimile)

Steven A. Augustino
Jennifer M. Kashatus
KELLEY DRYE & WARREN, LLP
1200 19th Street, NW, Suite 500
Washington, DC 20036
(202) 955-9600 (telephone)
(202) 955-9792 (facsimile)

February 12, 2002

TABLE OF CONTENTS

	Page
I. ILECS DOMINATE THE SPECIAL ACCESS SERVICES MARKETPLACE.....	2
A. Cable & Wireless Depends Upon ILECs for the Provision of Special Access Services.....	2
B. Cable & Wireless Does Not Have Sufficient Alternative Suppliers.....	5
1. Last Mile	7
2. Rights-of-Way/Building Access Issues	8
3. Self-Supply	9
C. The Current Special Access Marketplace is Not Capable of Improving Areas Where Performance is Deficient.....	12
1. Pricing Flexibility is Not an Indicator that the Special Access Services Market is Competitive.	12
2. ILEC Performance Measures Are Insufficient.	15
II. PERFORMANCE MEASUREMENTS, STANDARDS, AND BENCHMARKS WILL PROMOTE COMPETITION AND DETER DISCRIMINATORY CONDUCT.	16
A. Performance Measurements Will Benefit Competition.....	17
B. Performance Measurements Will Deter Discrimination.....	19
III. CONCLUSION.....	21

An extra section break has been inserted above this paragraph. Do not delete this section break if you plan to add text after the Table of Contents/Authorities. Deleting this break will cause Table of Contents/Authorities headers and footers to appear on any pages following the Table of Contents/Authorities.